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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 BAO XUYEN LE, as Personal  
7 Representative of the Estate of Tommy Le;  
8 HOAI “SUNNY” LE; and DIEU HO,

9 Plaintiffs,

10 v.

11 REVEREND DR. MARTIN LUTHER  
12 KING, JR. COUNTY; and KING  
13 COUNTY DEPUTY SHERIFF CESAR  
14 MOLINA,

15 Defendants.

C18-55 TSZ

MINUTE ORDER

16 The following Minute Order is made by direction of the Court, the Honorable  
17 Thomas S. Zilly, United States District Judge:

18 (1) The deferred portion of the motion for summary judgment brought by  
19 defendant King County Deputy Sheriff Cesar Molina, docket no. 87, in which he sought  
20 qualified immunity as a matter of law, is DENIED.

21 Qualified immunity involves a two-pronged inquiry: (i) whether the facts, taken  
22 “in the light most favorable” to the party asserting injury, show that the state actor  
23 violated a constitutional right; and (ii) whether, when all inferences from the evidence are  
drawn “in the light most favorable” to the party asserting injury, the constitutional right  
in question was “clearly established” at the time of the violation. *See Tolan v. Cotton*,  
572 U.S. 650, 655-57 (2014). Whether Deputy Molina is entitled to qualified immunity  
is an issue of law that must be decided by the Court, *see Hunter v. Bryant*, 502 U.S. 224,  
228 (1991), but the Court may submit the related factual questions to the jury, *see*  
*Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) (citing cases from the First, Second,  
Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits).

With regard to the first part of the qualified immunity analysis, *i.e.*, whether  
Deputy Molina used excessive force in violation of the Fourth Amendment, the Court has  
already concluded that genuine disputes of material fact preclude summary judgment; the  
parties disagree about the events preceding the fatal shooting of Tommy Le. *See* Minute

1 Order at ¶ 2(c) (docket no. 148). As to the second question posed under the qualified  
immunity doctrine, Deputy Molina argues that recent opinions of the United States  
2 Supreme Court and the United States Court of Appeals for the Ninth Circuit require the  
Court to rule as a matter of law that, in shooting Tommy Le, Deputy Molina did not  
3 violate a “clearly established” constitutional right. None of the authorities on which  
Deputy Molina relies, however, permit the Court to resolve the parties’ factual disputes  
4 about what happened just prior to Tommy Le’s death. *See Kisela v. Hughes*, 138 S. Ct.  
1148 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 137  
5 S. Ct. 548 (2017); *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018);  
*Woodward v. City of Tucson*, 870 F.3d 1154 (9th Cir. 2017); *S.B. v. Cty. of San Diego*,  
6 864 F.3d 1010 (9th Cir. 2017); *see also Reese v. Cty. of Sacramento*, 888 F.3d 1030,  
1037 (9th Cir. 2018) (reiterating that, with respect to the “clearly established” prong of  
7 the qualified immunity analysis, “only the jury can decide the disputed factual issues”  
(quoting *Morales*, 873 F.3d at 823)).

8  
Indeed, in *Reese*, the issue of qualified immunity was not resolved until after a  
9 seven-day jury trial, on a post-verdict motion for judgment as a matter of law, 888 F.3d at  
1035-36, and in every other recent opinion cited by Deputy Molina, the facts either  
10 (i) were “largely undisputed,” *see Woodward*, 870 F.3d at 1155; *see also Vos*, 892 F.3d at  
1028 (events were captured on surveillance video); *S.B.*, 864 F.3d at 1012 (three sheriff’s  
11 deputies provided generally consistent accounts); or (ii) established beyond doubt that the  
injured individual had been armed and posed a threat to someone at the scene, *see Kisela*,  
12 138 S. Ct. at 1150-51 (woman with a large kitchen knife standing within six feet of her  
roommate); *White*, 137 S. Ct. at 549-50 (after decedent’s brother fired two shotgun blasts,  
13 decedent pointed a handgun out an open window at an officer and was shot by a different  
officer).

14  
The Supreme Court has articulated a reasonableness standard for evaluating  
15 whether the force used to effect a particular seizure was consistent with the Fourth  
Amendment. *See Graham v. Connor*, 490 U.S. 386 (1989). The factors outlined in  
16 *Graham* include “the severity of the crime at issue, whether the suspect poses an  
immediate threat to the safety of the officers or others, and whether he is actively  
17 resisting arrest or attempting to evade arrest by flight.” *Id.* at 396. The Ninth Circuit also  
considers the quantum of force used, the availability of alternative methods of capturing  
18 or detaining the suspect, and the suspect’s mental and emotional state. *See, e.g., Luchtel*  
*v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010). According to the Ninth Circuit, since  
19 before June 2017, when Tommy Le was fatally shot, the law has been “clearly  
established” that law enforcement personnel “may not kill suspects who do not pose an  
20 immediate threat to their safety or to the safety of others simply because [the suspects]  
are armed.” *Van Bui v. City & Cty. of San Francisco*, 699 Fed. App’x 614, 616 (9th Cir.  
21 2017) (defining “clearly established” law as of December 2010). In this matter, whether  
Tommy Le was “armed” is in dispute. Moreover, plaintiffs have raised triable issues  
22 concerning (i) whether a reasonable officer in the same situation as Deputy Molina would  
have believed Tommy Le posed an immediate threat to the safety of the officers or others  
23 at the scene; and (ii) whether the use of less drastic measures was feasible. Whether

1 Deputy Molina is entitled to qualified immunity cannot be determined in advance of trial,  
and his motion for summary judgment must be denied.

2 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of  
3 record.

4 Dated this 24th day of May, 2019.

5 William M. McCool  
6 Clerk

7 s/Karen Dews  
8 Deputy Clerk  
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